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Supreme Court of the United States

OCTOBER TERM, 1980

GENERAL PUBLIC UTILITIES CORPORATION, METROPOLITAN EDISON COMPANY, JERSEY CENTRAL POWER & LIGHT COMPANY AND PENNSYLVANIA ELECTRIC COMPANY,
Petitioners,

v.

SUSQUEHANNA VALLEY ALLIANCE, RONALD L. DAVIS, BETTY TOMPKINS, BEVERLY M. HESS, AND DOREEN E. SNELL,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

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REPLY BRIEF OF PETITIONERS

MARK AUGENBLICK
Attorney of Record
GEORGE F. TROWBRIDGE
WM. BRADFORD REYNOLDS
SHAW, PITTMAN, POTTS & TROWBRIDGE
1800 M Street, N.W.
Washington, D.C. 20036
(202) 331-4100
Counsel for Petitioners

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REPLY BRIEF OF PETITIONERS

General Public Utilities Corporation, Metropolitan Edison Company, Jersey Central Power & Light Company and Pennsylvania Electric Company ("petitioners") hereby reply to the brief in opposition of respondents Susquehanna Valley Alliance *et al.* ("SVA"), and to the memorandum of the U.S. Nuclear Regulatory Commission ("NRC").

SVA argues that the decision below is not sufficiently important for Supreme Court review because it pays appropriate homage to the exhaustion doctrine in that it

dismissed plaintiffs' claims under the Atomic Energy Act, 42 U.S.C. § 2011 *et seq.*, and was justified in not dismissing plaintiffs' other claims involving the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq.*, the Federal Water Pollution Control Act, as amended ("the Clean Water Act"), 33 U.S.C. § 1251 *et seq.*, and the U.S. Constitution because pursuit of those claims before the NRC "would have been futile" (SVA Opp. at 19). It is admitted, however, that no effort was ever made by SVA to present these other claims to the NRC before taking them to court. The assertion of "futility" is therefore nothing more than a self-serving conclusion by SVA wholly without factual basis as the District Court expressly held. *See,* Pet. App. C at 39a.

The critical point ignored by SVA is that all of the allegations in its Complaint, whatever their statutory or constitutional basis, are aimed at the cleanup effort following the nuclear accident at Three Mile Island. That cleanup effort undeniably falls within the jurisdictional responsibility of the NRC as mandated by Congress. Administrative review by the NRC of the proposed water decontamination activities giving rise to this litigation is sufficiently broad to embrace not only objections arising under the Atomic Energy Act, but also those arising under NEPA, the Clean Water Act and the Constitution. *See*, Pet. at 9-16.

The fundamental question here is whether Congress has provided an administrative procedure capable of resolving SVA's claims. If an administrative procedure exists and if no exception to the exhaustion doctrine is present, the law has heretofore been that "such procedure must be utilized." *American Federation of*

Government Employees v. *Resor*, 442 F.2d 993, 994 (3rd Cir. 1971).[1]

The Third Circuit has opened the door for claimants to circumvent NRC review of claims similar to those advanced here and thereby has established a precedent which seriously undermines the exhaustion doctrine and presents an irreconcilable conflict with decisions in other Circuit Courts.[2] There is thus compelling reason for review by this Court.

The NRC correctly notes in its memorandum that the Third Circuit's holding is erroneous and contrary to this Court's "settled teaching on exhaustion of administrative remedies." NRC Mem. at 4-5. The NRC notes further that the Third Circuit had created a "trifurcated" review procedure which "lacks practical utility, segregates what should be an integrated decisional

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[1] The Third Circuit seemed particularly concerned by the District Court's phraseology used in dismissing the complaint:

> Pervading the treatment of this case by the district court, as well as the briefs of appellees is the notion that the judge-made rule of exhaustion of administrative remedies bears upon the subject matter jurisdiction of the District Court. That error is fundamental (Pet. App. B at 28a).

Cf. First Jersey Securities, Inc. v. *Bergen*, 605 F.2d 690, 700 (3rd Cir. 1979), *cert. denied*, 444 U.S. 1074 (1980). As the Third Circuit recognized earlier in *First Jersey Securities*, finding that the district court has jurisdiction is only the beginning of the inquiry; also to be addressed is whether the exhaustion doctrine required administrative review in the first instance, in which case the district court must abstain from exercising its jurisdiction pending final agency action.

[2] SVA's attempt to distinguish the cases cited in our certiorari petition as factually dissimilar is unpersuasive. The essential holdings of those cases are squarely in conflict with the Third Circuit's refusal below to require SVA to exhaust its available administrative remedies before obtaining judicial review of the NEPA, Clean Water Act and constitutional claims raised in connection with the TMI cleanup activities. *See,* Pet. at 10-16.

process, and is contrary to the policy underlying direct review statutes." *Id.* at 4. Nevertheless, the NRC somehow concludes that review by this Court is unnecessary because the Third Circuit's decision will have no precedential effect. This conclusion is apparently premised on the notion that the decision below will necessarily be regarded by other courts as an "anomaly". *Id.* at 5.[3]

The recent grant of certiorari in *National Sea Clammers Association* v. *City of New York*, 616 F.2d 1222 (3rd Cir.), *certiorari granted*, Nos. 79-1711, 79-1754, 79-1760 and 80-12, 49 U.S.L.W. 3280-81 (October 20, 1980), underscores the importance of this case. Relying on *Sea Clammers*, the Third Circuit ruled below that, wholly apart from the citizen suit provision of the Clean Water Act, SVA could maintain its claim in district court under the savings clause in that statute, 33 U.S.C. § 1365(e), simply by alleging the jurisdictional amount in controversy and charging a violation of 33 U.S.C. § 1311(f). Pet. App. B at 24a. Thus, the first issue on which this Court granted certiorari in *Sea Clammers* is also presented here.[4]

Moreover, the decision below carries *Sea Clammers* a step further. For it holds that, as a result of the im-

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[3] It is for precisely the reasons cited by the NRC that this Court should exercise its certiorari jurisdiction. *See*, Supreme Court Rule 17.1(a) and (c). We have set forth in our petition the reasons why failure to apply the exhaustion doctrine interferes with established administrative processes and the judicial review procedure established by Congress. Pet. at 7-17. The issue here is important and recurring in nature, the conflict among the Circuits real and therefore the case one which warrants resolution by this Court.

[4] The issue in *Sea Clammers* was whether a private citizen who has failed to satisfy the notice requirements of the citizen suit provisions of the Clean Water Act, 33 U.S.C. § 1365 (a) and (b), can nevertheless maintain a district court action under the "savings

plied right of action established in *Sea Clammers*, private plaintiffs can bypass administrative review (whether by the EPA, the NRC or some other appropriate agency) and maintain a federal court action on an alleged, prospective violation of the Clean Water Act regardless whether the agency is holding review proceedings with respect to the matter or is already taking measures to prevent or remedy the alleged violation. In a word, the doctrine of exhaustion of administrative remedies has been effectively removed as a requirement for private actions brought under the Clean Water Act. This holding is all the more surprising because it comes under a statute containing an explicit, detailed mechanism for bringing citizen suits which has as its main focus agency enforcement in the first instance, not precipitous judicial intervention. *City of Evansville, supra,* 604 F.2d at 1015-1016.

Therefore, *Sea Clammers* and the instant case present complementary questions which deserve equal attention by this Court. In both Third Circuit decisions, there is the important issue on which certiorari has already been granted in *Sea Clammers* as to whether the Clean Water Act grants a private right of action independent

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clause," 33 U.S.C. § 1365(e), by merely alleging the jurisdictional amount in controversy and invoking federal question jurisdiction via a charge of violation of the substantive provisions of the Act. While recognizing that its decision was in direct conflict with those by the Seventh Circuit in *City of Evansville, Indiana* v. *Kentucky Liquid Recycling, Inc.*, 604 F.2d 1008, 1012-16 (7th Cir. 1979), *cert. denied*, 444 U.S. 1025 (1980), and *City of Highland Park* v. *Train*, 519 F.2d 681, 693 (7th Cir. 1975), *cert. denied*, 424 U.S. 927 (1976), the Third Circuit nevertheless held in *Sea Clammers*, and reiterated here, that an implied right of action under the Clean Water Act was created by Congress by virtue of the savings clause, independent of the requirements of the citizen suit provisions in that statute. 616 F.2d at 1228-1231.

of the rights (and requirements) explicitly created by the citizen suit provisions of the Act. If such a right of action does exist, the instant case presents, among other issues, the additional question of whether a party can exercise that right without first exhausting the administrative remedies available to him before the agency.

The importance of the questions presented by this case, the potential disruptive affect on agency proceedings if the rule announced by the Third Circuit is allowed to stand, and the contrary holdings in other Circuits provide ample justification for Supreme Court review of the decision below. For the reasons stated herein and in our petition, certiorari should be granted.

Dated: November 7, 1980

Respectfully submitted,

MARK AUGENBLICK
Attorney of Record
GEORGE F. TROWBRIDGE
WM. BRADFORD REYNOLDS
SHAW, PITTMAN, POTTS & TROWBRIDGE
1800 M Street, N.W.
Washington, D.C. 20036
(202) 331-4100

Counsel for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of November, 1980, a copy of the foregoing Reply Brief Of Petitioners was served by deposit in the United States mail, first class, postage prepaid, upon the following:

Solicitor General
Department of Justice
Washington, D.C. 20530

Stephen F. Eilperin, Esq.
Solicitor
U.S. Nuclear Regulatory Commission
1717 H Street, N.W.
Washington, D.C. 20555

Michael Churchill, Esq.
Judith A. Dorsey, Esq.
Public Interest Law Center of Philadelphia
1315 Walnut St., 16th Fl.
Philadelphia, Pennsylvania 19107

Jean Royer Kohr, Esq.
Minney, Mecum & Kohr
150 E. Chestnut Street
Lancaster, Pennsylvania 17602

Albert J. Slap, Esq.
1009 Black Rock Road
Gladwyne, Pennsylvania 19035

Larry B. Selkowitz, Esq.
Widoff, Reager, Selkowitz & Adler
P.O. Box 1547
Harrisburg, Pennsylvania 17105

MARK AUGENBLICK